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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933

No. 498

THE FEDERAL LAND BANK OF BERKELEY,
A CORPORATION, PETITIONER,

vs.

SAMUEL S. WARNER ET UX. ET AL., RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, The Federal Land Bank of Berkeley, respectfully prays for a writ of certiorari herein to review a certain final decision of the Supreme Court of the State of Arizona, being the court of last resort of said State, in the above entitled action, the opinion and decision of said court having been rendered and filed on July 1, 1933; by which decision the said court modified in part and affirmed in part a foreclosure decree of the Superior Court of Maricopa County, State of Arizona. This petition has to do with that part of the decision of the Supreme Court of Arizona which affirms the lower court's decree.

Statement of Facts.

The petitioner is one of the twelve Federal land banks chartered by the Federal Farm Loan Board under the provisions of an Act of Congress approved July 17, 1916, and Acts amendatory thereto, known and cited as the Federal Farm Loan Act (12 U. S. C. ch. 7). The petitioner is authorized and empowered to operate and do business in the Eleventh Federal Land Bank District comprising the States of Arizona, California, Nevada and Utah. The business of the petitioner is to make loans to farmers and to take as security therefor first mortgages on farm lands duly qualified under the provisions of the said Federal Farm Loan Act.

On November 1, 1922, the respondents, Samuel S. Warner and Lydia S. Warner, his wife, executed and delivered to this petitioner their certain promissory note in the principal amount of $7,200, together with their mortgage covering certain real property situate in Maricopa County, State of Arizona, as security for the payment of said note. The mortgage agreement so executed and delivered by these respondents contained the following stipulation:

> "(10) That in case of institution of suit to foreclose this mortgage, the mortgagors shall pay, as a part of the debt hereby secured, all costs and legal expenses and reasonable attorney's fee to be fixed by the Court, and that said attorney's fee is and shall be a lien upon said premises and secured by this mortgage * * *"

The respondents having defaulted in the payments provided for in the aforesaid promissory note, this action to foreclose the mortgage was begun in the Superior Court of Maricopa County, Arizona. The petitioner, in its foreclosure complaint, asked for a reasonable attorney's fee of

$125 under the provisions of the aforesaid stipulation contained in paragraph 10 of the mortgage agreement. Petitioner in its complaint averred that "The whole of said fee, if allowed by the court, is to be paid to and be retained by the attorneys of record in this case." The reasonableness of this amount, no part of which was sought by petitioner for any purpose other than the actual payment of its counsel fees, was not at any time disputed.

The respondents in their answer admitted the execution and delivery of the aforesaid promissory note and mortgage, but denied that the petitioner was entitled to any attorney's fee for the reason that the stipulation contained in paragraph 10 was unenforceable in that it was in violation of and prohibited by the provisions of the Federal Farm Loan Act, as amended.

The trial court denied an attorney's fee to the petitioner and this petitioner appealed to the Supreme Court of Arizona, the court of last resort in the State, from such decision. The appeal came on for hearing and the Supreme Court of the State of Arizona, on July 1, 1933, affirmed the decision of the Superior Court of Maricopa County to the effect that the Federal Farm Loan Act forbids a Federal land bank from recovering the amount of the fee to be paid to its attorney in the event of the foreclosure of its mortgages. The opinion below, which has not yet been reported, is set forth in the record.

Question Presented.

The question involved is whether or not the provisions of the Federal Farm Loan Act prohibit a Federal land bank from recovering an attorney's fee in the event of the foreclosure of a mortgage, and thereby invalidate a specific stipulation in the mortgage that the mortgagor shall

pay such fee, where there is no State statute or law prohibiting the inclusion of such stipulation in the mortgage agreement.

Statutes Involved.

Federal Farm Loan Act (12 U. S. C., ch. 7).

Emergency Farm Mortgage Act of 1933, which is Title II of the Agricultural Adjustment Act of May 12, 1933, Public Law No. 10, 73d Congress; 48 Stat. 41 *et seq.*

Specification of Error to be Urged.

The Supreme Court of Arizona erred in sustaining the holding of the Superior Court of Maricopa County of Arizona to the effect that this petitioner was not entitled to a reasonable attorney's fee in its decree foreclosing the mortgage agreement between the petitioner and the respondents, on the ground that the Federal Farm Loan Act prohibits the Federal land bank from recovering such a fee.

Practical Importance of Legal Question.

The question raised is one of general and significant importance to the petitioner and to the other eleven Federal land banks, and to some forty-nine joint stock land banks, chartered under the Federal Farm Loan Act, in that:

1. The twelve Federal land banks now hold farm mortgages in an approximate amount of $1,120,000,000. The joint stock land banks hold farm mortgages in an approximate amount of $500,000,000. Except in a very few States where local law prohibits such contracts, all of these mortgages (or trust deeds) contain stipulations or provisions generally similar in form and effect to paragraph 10 of the mortgage foreclosed in this action, and providing for the payment by the mortgagors of an attorney's fee in the event

of foreclosure. Under the recent Emergency Farm Mortgage Act of 1933 (May 12, 1933), the Federal land banks are authorized to expand immediately their activities to the extent of $2,000,000,000 in additional farm mortgage financing operations. The mortgage agreements to be taken as security behind this tremendous program of new financing by the land banks will contain provisions and stipulations providing for the payment of an attorney's fee by the mortgagors in the event of default in the mortgage agreement and the institution of foreclosure proceedings. It is of particular importance, therefore, that the question involved in this case be decided by the United States Supreme Court.

2. The mortgages taken by the Federal and joint stock land banks from their respective borrowers under the terms of the Federal Farm Loan Act, and those to be taken under the Emergency Farm Mortgage Act of 1933, constitute or will constitute solemn contracts between the borrowers and the banks. Under the terms of the Federal Farm Loan Act the bonds issued by the banks are secured by these mortgages and if the decision of the lower court should be sustained the security back of the bonds will be materially impaired inasmuch as the banks would be compelled to bear the burden of paying attorney's fees upon foreclosure of the mortgages.

3. The question involved herein has never been passed upon heretofore by this Court or by any Federal court or by any court of last resort of any other State to the knowledge of this petitioner, and it therefore becomes one of first instance and of extreme importance in guiding this petitioner and the other Federal land banks in carrying out and putting into effect the program of refinancing a large portion of the nation's farm mortgage debt.

Wherefore, your petitioner prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Supreme Court of the State of Arizona, commanding that court to certify and forward to this Court a full and complete transcript of the record in the proceeding in said Supreme Court had in the case numbered and entitled on its docket, No. 3256, The Federal Land Bank of Berkeley, a corporation, Appellant, vs. Samuel S. Warner, *et ux. et al.*, Appellees, to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States, and that petitioner may have such other and further relief in the premises as this Court may deem proper.

THE FEDERAL LAND BANK OF BERKELEY,
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IN THE

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No.

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vs.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Jurisdiction of this Court.

1. The jurisdiction of this Court is invoked under 28 U. S. C. 344(*b*) (Judicial Code, Section 237, as amended by the Act of February 13, 1925, 43 Stat. 938).

2. This case involves the question as to whether or not the provisions of the Federal Farm Loan Act, 12 U. S. C., chap. 7, prohibit a Federal land bank from recovering an attorney's fee in the event of the foreclosure of a mortgage when such mortgage itself contains a specific stipulation on the mortgagor's part that the latter will pay such attor-

ney's fee, and where there is no State statute or law prohibiting the inclusion of such stipulation in the mortgage agreement. This question is presented in this case for the first time and involves the correct interpretation of the provisions of the aforesaid Federal Farm Loan Act. This decision of the Supreme Court of Arizona involves an important and substantive question of Federal law which has not been, but which petitioner believes should be, settled by this Court.

II.

Statement of Facts.

The facts in this case have already been stated in the preceding petition under the heading "Statement of Facts," pages 2 to 3, which are hereby adopted and made a part of this brief.

III.

Assignment of Error Intended to be Urged.

The final decision and judgment of the Supreme Court of Arizona is erroneous in that it construes and interprets the Federal Farm Loan Act, 12 U. S. C., chap. 7, as prohibiting and denying the petitioner and the respondents the right to include in the mortgage agreement a stipulation to the effect that the mortgagors shall pay an attorney's fee in the event of the default of the latter in carrying out the terms, conditions, and covenants of the mortgage agreement, and that, therefore, under such Federal statute this petitioner cannot recover any attorney's fee when the mortgage is foreclosed.

IV.

Summary of Argument.

1. It was the intention of Congress under the Federal Farm Loan Act that the status of mortgage liens accepted

by the Federal land banks, and the procedure to be followed in case of foreclosure and the subsequent rights of the parties to such foreclosure proceedings, should be fixed by the laws of the State in which the mortgaged premises are situated (12 U. S. C., Secs. 971, 972).

2. A stipulation in a mortgage agreement that the mortgagor shall pay an attorney's fee in the event of foreclosure is legal and enforceable under the laws of the State of Arizona and the decisions of the Supreme Court of Arizona. The Supreme Court of the State of Arizona so held in this decision.

3. The provisions of Sections 771, 781, and 791 of 12 U. S. C., respecting fees and charges which a Federal land bank is allowed to make and collect are inapplicable to the question involved in this assignment of error. These provisions of the Federal Farm Loan Act have to do only with fees and charges incident to negotiating, making and carrying mortgage loans. They are in no way connected with the proper damages and costs which may be recovered by a Federal land bank to indemnify it for the expense and cost incident to enforcing the legal remedies available to a mortgagee.

4. Under Sections 642, 771, 971, and 972, of Title 12, U. S. C., this petitioner and the other Federal land banks are permitted to protect themselves against loss in the case of default under any mortgage.

5. Under Section 676, *Fourth,* of 12 U. S. C., this petitioner is expressly empowered "to sue and be sued, . . . in any court of law or equity, as fully as natural persons", and is therefore entitled to an award of attorney fees in a foreclosure action brought in an Arizona court.

V.

ARGUMENT.

Section 971 of Title 12, U. S. C., provides as follows:

> "It shall be the duty of the Farm Loan Commissioner to make examination of the laws of every State of the United States and to inform the Federal Farm Loan Board as rapidly as may be whether in his judgment the laws of each State relating to the conveying and recording of land titles, *and the foreclosure of mortgages or other instruments securing loans, * * * are such as to assure the holder thereof adequate safeguards against loss in the event of default on loans secured by any such mortgages.*" (Italics ours.)

Section 972 then provides that until such examination is made of the laws of any State in which a Federal land bank is to make loans, and until such laws are found satisfactory in the judgment of the Farm Loan Commissioner to protect the bank against loss in the event of default on loans secured by any such mortgages, that mortgages taken by the bank in such State are ineligible as the basis for an issue of farm loan bonds. This section further provides that if the laws of any such State afford insufficient protection to the mortgagee any mortgage taken on land in such State shall be ineligible during the continuance of the laws in question.

Under the provisions of the Act as above referred to this petitioner, and every other Federal land bank, is authorized to safeguard itself against loss by including in its mortgages proper and adequate provisions for the collection of reasonable attorney fees in case of foreclosure. Only in this way can these banks be protected and safeguarded against the loss and expense which they would have to

suffer in the event of defaults in their mortgages and foreclosure having to be resorted to.

In the face of the above mentioned provisions of the Act it was held by the court below that this petitioner is prohibited from recovering an attorney's fee in the foreclosure proceedings instituted against these respondents by reason of the prohibition contained in the "Fifth" paragraph of Section 791 of 12 U. S. C., namely, that no Federal land bank shall have the power "To demand or receive, under any form or pretense, any commission or charge not specifically authorized in this Act"; and that the bank is not specifically authorized to recover such a fee under the provisions of the Act.

It is apparent from a study of the provisions of Sections 771 and 781 of 12 U. S. C., that the interest, fees and charges therein specifically authorized are those incidental to negotiating and carrying mortgage loans. Such fees and charges only have to do with transactions prior to and during the life of the loan contract. They are in no way connected with the proper damages and costs which may be recovered by the bank to indemnify it for the expense and cost incident to enforcing its legal remedies after default. The limitations of the law respecting fees and charges are designed to protect borrowers under the Land Bank System from unjust charges connected with the making and carrying of their loans.

The court below relied also upon Section 983 of 12 U. S. C., which prohibits and penalizes the charging or receiving of "any fee, commission, bonus, gift or other consideration not herein specifically authorized." It is submitted, however, that these terms relate to charges for the extension of leniency or forbearance, or for the rendition of some service by one party to another. It is the compensation allowed for such service or forbearance (1 Bouvier's

Law Dictionary, p. 548). An attorney's fee when stipulated for in a mortgage is not a "commission or charge." It is not compensation for the rendering of service by the mortgagee to the mortgagor. It is an indemnity or item of special damage to which the mortgagee is entitled because of the default of the mortgagor under his contract, and the expense resulting to the mortgagee in the enforcement of its legal remedy. (*Wilson Sewing Machine Co.* v. *Moreno*, 7 Fed. 806; *Missouri, K. & T. R. Co.* v. *Cade*, 233 U. S. 642, 34 Sup. Ct. Rep. 678.)

In other words, the prohibitions contained in Sections 791 and 983 refer only to transactions between the bank and the borrower leading up to the making of the loan, or to services and forbearances extended by the bank to the borrower during the life of the contract. An attorney's fee is not a consideration for services rendered by the bank to a borrower. In reality it is not a fee at all. It is an expense necessarily incident to the remedy. The right of a mortgagee to demand indemnity against such expense by a covenant in the mortgage deed, and to enforce such covenant, is a part of the remedy. Under the procedure in most States, such provision is for reimbursement of the mortgagee for the amount which he has been compelled to incur in fees to his attorney for the enforcement of the remedy; while in a few States the same end is achieved under a different practice by indemnifying the mortgagee against the incurring of an expense for attorney's fees, the expense in such States being met by the mortgagor direct, and the award or judgment running in favor of the attorney.

Each Federal land bank is expressly vested with power "to sue and be sued, complain, interplead, and defend, in any court of law or equity, as fully as natural persons."

(12 U. S. C., 676, *Fourth*). In the instant case, the Federal Land Bank of Berkeley, in the exercise of this power, sued the defendants in an Arizona court. Had the suit been brought by a natural person, such person would have been entitled, as above stated, to an award of attorney fees, under the law of the State of Arizona. It is submitted that such award is an incident to the remedy of foreclosure, and, under the provision just quoted, is available to this petitioner "as fully as natural persons."

Respectfully submitted,

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vs.

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA.

BRIEF ON BEHALF OF PETITIONER.

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BRIEF ON BEHALF OF PETITIONER.

I

Statement of the Case.

1. *Jurisdiction of This Court.*

The jurisdiction of this Court is invoked under Section 344 (*b*), Title 28, U. S. C. (Judicial Code, § 237). The title, rights, privileges, and immunities especially set up and claimed by both parties to be cause are based upon, and governed by, a statute of the United States; that is, the Federal Farm Loan Act. The Supreme Court of Arizona, the highest court of that State, has rendered a final judgment in the cause. (*Federal Land Bank of Berkeley* v. *Warner*, 23 P. (2d) 563.)